Smithfield Foods, Inc. and Smithfield Packing Company, Incorporated *and* United Food and Commercial Workers, Local 204, and United Food and Commercial Workers International Union.[1]

Cases 11–CA–18415 and 11–CA–18606

August 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 22, 2001, Administrative Law Judge George Carson II issued the attached decision. The Respondent,[2] the General Counsel, and Charging Party Local 204 filed exceptions and supporting briefs, and the Respondent filed answering briefs.[3]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to adopt the judge's rulings,[4] findings,[5] and conclusions and to adopt the recommended Order as modified.

1. The General Counsel excepts to the judge's dismissal of the complaint allegation that the Respondent, through Wilson Plant Manager Phil Price, unlawfully promised unspecified benefits to employee Clairenette Williams to discourage union support. The judge found that Price told Williams that he knew there were a lot of problems and that "he was going to make a lot of changes, so that they wouldn't want a Union next year," adding that he was disappointed in her. However, the judge dismissed the allegation as untimely under Section 10(b). The General Counsel asserts that it was timely because it was closely related to other allegations in the timely-filed charge.

We adopt the judge's finding. In accordance with the Board's decision in *Redd-I*, 290 NLRB 1115, 1116 (1988), an allegation may be considered as timely under Section 10(b) when it is closely related to allegations in a timely filed charge and it occurred within 6 months before the filing of the charge. The promise at issue here was allegedly made in July 1999. The charge in 11–CA–18606 was filed more than 6 months later, i.e., on February 28, 2000. Therefore, as the judge found, the allegation is untimely under Section 10(b) regardless of whether, as the General Counsel contends, it is closely related to allegations in the charge.[6]

The General Counsel also relies in part on the charge in Case 11–CA–18415. That charge was filed on July 27, 1999, and it contains an allegation that there were unlawful promises of benefit. However, such alleged promises were litigated before Judge Robertson in a prior case, and they did not include the Price-Williams matter. Thus, assuming arguendo that the charge in Case 11–CA–18415 was intended to cover that matter, the General Counsel elected not to issue a complaint with respect to it in the case before Judge Robertson. In these circumstances, the General Counsel cannot now seek to resurrect that charge for 10(b) purposes.[7]

2. We adopt the judge's finding that the termination of employee Andre Farmer violated Section 8(a)(3). We do not condone Farmer's offensive behavior of holding a side strip of bacon at his groin area in the presence of

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[1] We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers from the AFL–CIO effective July 29, 2005.

[2] Smithfield Foods, Inc. and Smithfield Packing Company, Incorporated are referred to collectively as "the Respondent." As discussed in greater detail in *Smithfield Foods, Inc.*, 347 NLRB No. 109 (2006), we have found that Smithfield Foods is liable for the unlawful conduct found therein. In the instant case, we find that Smithfield Foods is liable for the conduct found unlawful herein, viz the discharge of Farmer. Specifically, Smithfield Foods participated in the campaign opposing the Union at Smithfield Packing's Wilson facility, as demonstrated by a letter from Smithfield Foods President Lewis Little soliciting grievances from Wilson employees, prior to the unlawful discharge of Andre Farmer. Accordingly, we find that Smithfield Foods is properly held liable for Farmer's discharge.

[3] Local 204 filed a motion instanter to file corrected exceptions and brief, which, inter alia, added a new exception, a section of the brief pertaining to the new exception, and a paragraph concerning another exception. The Respondent opposes Local 204's motion. We deny the motion, because the additions to Local 204's exceptions and brief are untimely. We further find that, even with these additions, our decision in this proceeding would be the same.

[4] The Respondent excepts to the judge's ruling permitting the General Counsel to amend the complaint to include the allegation, from the charge in Case 11–CA–18415, that the discharge of Farmer violated Sec. 8(a)(3). By Order dated April 18, 2001, the first day of the hearing in this proceeding, the Board denied the Respondent's motion to dismiss the allegation and found that the Regional Director had appropriately consolidated it in this proceeding. The Board noted that the hearing in the companion case, which included Case 11–CA–18415, had begun before the Office of Appeals reversed the Regional Director's determination not to issue a complaint concerning Farmer's discharge. In accordance with the Board's Order, we find that the judge properly permitted the amendment of the complaint.

[5] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[6] We find it unnecessary to pass on the judge's further finding that the allegation was not fully litigated.

[7] See *Ducane Heating Corp.*, 273 NLRB 1389 (1985), enfd. mem. 785 F.2d 304 (4th Cir. 1986).

women employees. However, we agree with the judge that the General Counsel satisfied his initial burden under *Wright Line*[8] and that the Respondent failed to carry its burden to demonstrate that Farmer would have been terminated even in the absence of his union activity.[9] Human Resources Director Sherman Gilliard testified that Farmer's conduct was "not inappropriate enough to resort to termination." Moreover, as the judge found and the record shows, the Respondents did not terminate other employees for a first offense of sexual harassment. Contrary to the Respondent's assertion, the record further shows that the Respondent did not terminate employees who denied having committed an offense. Under these circumstances, we find the termination of Farmer unlawful.

3. We find, in agreement with the judge, that the Respondent did not constructively discharge Clairenette Williams. Williams suffered a fall at work on August 16, 1999, and was restricted to light duty until September 7, 1999. However, the record indicates that she was under no medical restriction after that date, and she made no complaint to the Respondent of continued pain from the fall. The judge found that, when Williams asked Gilliard for a leave of absence on December 6, 1999, she cited personal rather than medical reasons. Gilliard informed Williams that he would get back to her concerning the request, because Department Manager Lytle needed to be involved. However, the judge found that no decision was ever reached on the matter. The following day, Williams called to say that she would be late for work, but she failed to report. Williams never returned to work after that date.

An employer constructively discharges an employee in violation of Section 8(a)(3) when, because of the employee's union activities, it places burdens on the employee that cause, and are intended to cause, a change in working conditions so unpleasant as to force the employee to resign.[10] A constructive discharge can also occur when the employer does not intend that the employee would quit his or her employment, but "reasonably should have foreseen that its actions would have that result."[11] Assuming arguendo that Williams quit her employment, and that she did so because the Respondent did not immediately approve her request, there would nonetheless be no violation. In the circumstances here, we find that Gilliard's response that he would get back to Williams regarding her request, rather than approving it immediately, did not constitute a change in working conditions that was intended to force Williams to quit her employment, or would have that foreseeable result. Accordingly, we adopt the judge's dismissal of this allegation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Smithfield Foods, Inc., and Smithfield Packing Company, Inc., Wilson, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(d) and (e).

"(d) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Wilson, North Carolina, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall

[8] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

[9] In finding that the General Counsel carried his initial burden, a we do not rely on the statements by Plant Manager Price or President Little that the three previous occupants of the facility closed after being organized by the Union. In *Smithfield Foods, Inc.*, 347 NLRB No. 109 (2006), issued concurrently with this decision, we found that these statements were protected by Sec. 8(c). However, we find animus based on the judge's factual finding that Price made a promise of unspecified benefits to employee Clairenette Williams. Although that conduct is immune from attack because of Sec. 10(b), it can nonetheless be used to show animus. *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411, 416 (1960). In addition, we rely on other violations of Sec. 8(a)(1) that occurred prior to Farmer's discharge and were found in the companion case, which originally included the Farmer allegation. Those violations included consultant Jeff White's threat of plant closure, President Little's solicitation of grievances, and Supervisor Eddie Paula's interrogation of Lakenya Harris and Eisonshafae Coppedge. Member Liebman would rely on all of the above evidence, including the plant closure statements.

[10] *Crystal Princeton Refining*, 222 NLRB 1068, 1069 (1976).

[11] *American Licorice Co.*, 299 NLRB 145, 148 (1990).

duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 13, 1999."

Dated, Washington, D.C. August 31, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the United Food and Commercial Workers, Local 204, and United Food & Commercial Workers International Union, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer Andre Farmer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Andre Farmer whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful discharge of Andre Farmer and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

SMITHFIELD FOODS, INC., AND SMITHFIELD PACKING COMPANY, INCORPORATED

Jasper C. Brown Jr., Esq., for the General Counsel.
Douglas M. Topolski and *Elena D. Marcuss, Esqs.*, for the Respondent.
Renee L. Bowser, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Wilson, North Carolina, on April 18, 19, and 20, 2001. The charge in Case 11–CA–18415 was filed on July 27, 1999, and was amended on December 12, 1999.[1] The charge in Case 11–CA–18606 was filed on February 28, 2000, and was amended on April 13, 2000. The consolidated complaint issued on February 7, 2001. The complaint alleges a promise of unspecified benefits in order to discourage employee support for the Union in violation of Section 8(a)(1) of the National Labor Relations Act and the discharges of Andre Farmer and Clairenette Williams because of their union activity in violation of Section 8(a)(3) of the Act. The Respondent's answer denies all of the alleged violations of the Act. I find that the discharge of Farmer did violate the Act as alleged in the complaint.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent Smithfield Foods, Inc., is a holding company and parent of the Respondent Smithfield Packing Company, Incorporated, a Virginia corporation, engaged in the manufacture and nonretail sale of pork products at its facility at Wilson, North Carolina, where it annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside the State of North Carolina. The Respondent, hereinafter referred to as Smithfield or the Company, admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that United Food and Commercial Workers, Local 204, and United Food & Commercial Workers International Union, AFL–CIO, CLC, the

[1] All dates are in the year 1999 unless otherwise indicated.

[2] The subpoena served by counsel for the Charging Party upon the Respondent that was admitted into evidence near the close of the hearing is hereby designated as CP Exh. 23.

Union, are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union began organizational activities at the Company's Wilson facility in March 1999. A representation election was conducted on July 8. The Company opposed the Union's organizational efforts. In the course of the organizational campaign, the Union alleged that the Company violated the Act on numerous occasions and in numerous ways, including discharging prounion employees. The Union filed unfair labor practice charges, including the charge in Case 11–CA–18415. A consolidated complaint issued, and a hearing was held before Administrative Law Judge Pargen Robertson on various dates beginning on March 13 and ending on June 20, 2000. The charge in Case 11–CA–18415 alleged, inter alia, the discharge of employee Andre Farmer. The Region dismissed that allegation and the Union appealed. While that appeal was pending, the hearing opened before Judge Robertson. Evidence regarding the allegations of the consolidated complaint, which included all allegations in Case 11–CA–18415 that had not been dismissed, was presented to Judge Robertson. Judge Robertson issued his Decision and recommended Order on January 23, 2001. The Region's dismissal of the portion of the charge in Case 11–CA–18415 that related to Farmer was, ultimately, reversed by the Office of Appeals, and the Region was directed to issue a complaint.

The charge in 11–CA–18606 was filed on February 28, 2000, shortly before the hearing opened before Judge Robertson. That charge alleged, inter alia, the unlawful discharge of employee Clairenette Williams on December 8. Williams testified early in the hearing before Judge Robertson regarding the union authorization card that she signed and regarding facts relating to the termination of Lenora Wooten. The initial complaint in Case 11–CA–18606, alleging the unlawful discharge of Williams and an unlawful promise of unspecified benefits issued on May 4, 2000.

On March 20, 2001, more than 28 days prior to the scheduled commencement of this hearing, counsel for the Respondent filed a motion to dismiss or, in the alternative, for summary judgment with regard to the 8(a)(3) discharge allegations relating to Farmer and Williams and the single Section 8(a)(1) allegation. The motion argues that prosecution of this case is in violation of the Board's Rules and Regulations concerning the amendment and consolidation of complaints, is barred by Section 10(b) of the Act, and is precluded by Board policy, citing *Service Employees Local 87 (Cresleigh Management)*, 324 NLRB 774 (1997), *Jefferson Chemical Co.*, 200 NLRB 992 (1972), *and Peyton Packing Co.*, 129 NLRB 1358 (1961). Contemporaneously, counsel filed a Motion to Issue Notice to Show Cause and to Stay Hearing. Immediately prior to the opening of the hearing herein, the parties were advised that the Respondent's Motion to Stay hearing was being denied and that the Board was issuing an Order on the Respondent's Motion. The Board's Order issued on April 18. On April 19, 2001, it was received as General Counsel's Exhibit 3. The Order denied the Motion to Dismiss or, in the alternative, for summary judgment. The final paragraph of the Order provides that the Respondent's 10(b) argument with regard to the 8(a)(1) allegation should be "resolved after a hearing before an administrative law judge."

Notwithstanding the foregoing Order of the Board, the Respondent, in its brief, reargues the merits of its motions to the Board that were denied on April 18, 2001. The Board's Order is the law of the case. Consistent with the Order of the Board, I reject the arguments of the Respondent regarding the propriety of prosecuting the discharges of Farmer and Williams.

B. The 8(a)(1) Allegation and Evidence of Animus

Pursuant to the Order of the Board, I heard the evidence relating to the 8(a)(1) allegation and the Respondent's argument that prosecution of this allegation is barred by Section 10(b) of the Act. The complaint alleges that Plant Manager Phil Price, on July 9 or 10, promised employees unspecified benefits in order to discourage their support for the Union. The evidence in support of this allegation consisted of testimony by alleged discriminatee Clairenette Williams who recalled that, a day or two after the election on July 8, Plant Manager Price spoke to her in the hot dog production area as she was going to the Shipping Department to begin work. Price asked Williams why the employees wanted a Union, and Williams replied that it was because they "wanted to be treated fair." According to Williams, Price responded that he knew there were a lot of problems and that "he was going to make a lot of changes, so they wouldn't want a Union next year," and he then added that he was disappointed in her.

The Respondent has moved to dismiss this allegation, arguing that litigation of it is precluded by Section 10(b) of the Act because the alleged incident occurred in early July, more than 7-1/2 months before the charge was filed. This 8(a)(1) allegation appears in the initial complaint that issued in Case 11–CA–18606 on May 4, 2000. There is no contention that this allegation is a part of Case 11–CA–18415. All aspects of that case were litigated before Judge Robertson except for the allegation relating to the termination of Farmer. The charge in Case 11–CA–18606 was filed on February 28, 2000, thus the 10(b) date is August 28, 1999. General Counsel, citing *Redd-I, Inc.*, 290 NLRB 1115 (1988), argues that this allegation reveals animus and "is closely related to Williams' discharge." I do not agree. The predicate for application of the closely related principle enunciated in *Redd-I* is that the event "occurred within 6 months before the filing of the charge." Id. at 1116 and 1118. The alleged promise of benefit occurred more than 6 months before the filing to the charge. I grant the Respondent's motion and shall recommend that this allegation be dismissed.

Notwithstanding my dismissal of the 8(a)(1) allegation, I shall consider the evidence relating to this alleged incident for purposes of background. *Monogahelia Power Co.*, 324 NLRB 214 (1997).[3]

[3] Counsel for the Respondent chose not to examine Plant Manager Price regarding this incident, thus, as counsel for the General Counsel correctly notes, the testimony of Williams is undenied. In choosing not to elicit a denial from Price, counsel ran the risk that I would deny the motion to dismiss predicated upon Sec. 10(b). Counsel chose to rely

At the hearing, counsel for the General Counsel and counsel for the Charging Party requested that I take judicial notice of the decision of Judge Robertson. Counsel for Respondent noted that exceptions had been filed to that decision. I stated that I would not take notice of any findings of Judge Robertson until they were affirmed by the Board. *Advertisers Mfg. Co.*, 275 NLRB 100, 102 (1985). Thereafter, counsel for the Charging Party sought to introduce the transcripts of several presentations that the Respondent had made to employees during the course of the campaign, arguing that they established animus. These same transcripts are the basis of 8(a)(1) allegations in the case before Judge Robertson and are in evidence in that case. For that reason I rejected their proffer, noting that they need not be placed in this record because, consistent with Board precedent, I take notice of the record of Board proceedings. *Postal Service*, 273 NLRB 1746 fn. 2 (1985); *Seine & Line Fisherman's Union of San Pedro*, 136 NLRB 1 (1962). The decision of Judge Robertson sets out remarks made by Human Resources Manager Sherman Gilliard and Company President Lewis Little as they appear in General Counsel's Exhibit 54(a) and Respondent's Exhibit 44 in that proceeding. Gilliard noted the history of the Wilson plant, pointing out that previously three different companies had owned the plant, that "the Union was here," and that all three companies had closed. Although Gilliard noted that he "could not verify" that the closures were because of the Union, he continued his remarks stating the following to the employees: "I would hope that people would see all the lives and all the families that's been damaged by the United Food and Commercial Workers Union in this building in this community and vote no. I think history sometime says a lot and I hope people learn from the history that has existed in this building." Little's comments include the following statement: "Don't hang the UFCW around this plant's neck for a fourth time: you have the chance to learn from the mistakes of the employees who lost with the UFCW three times before." (JD(ATL)–03–01, slip op. at 4.)

I find that the foregoing statements do establish animus towards employee union activity. *Gencorp*, 294 NLRB 717 fn. 1 (1989). I base this finding upon the contents of the statements, not the findings of Judge Robertson whose decision is pending before the Board.

C. Case 11–CA–18415, The Discharge of Andre Farmer

1. Facts

Andre Farmer began working for the Company on January 27. His last day of work was May 11. During his short tenure with the Company, Farmer became involved in the union organizational campaign. The Company began holding small group meetings relating to the Union. After Farmer posed questions to members of management at two small group meetings, Human Resources Manager Gilliard ceased to invite Farmer to any further meetings. Farmer testified that he solicited union authorization cards and distributed handbills. On one occasion when he was distributing handbills at the gate, Farmer testified that he was observed by his immediate Supervisor James Brown and Gilliard. Although Gilliard denied observing Farmer handbilling, the Company stipulated that it was aware that Farmer supported the Union.

Farmer worked on the pressing line in the bacon department. His job was to take pork bellies from the pressing machine to the slicing machine where the meat is trimmed and then sliced into bacon. He transported the pork bellies to the slicer in a large plastic cart.

On the evening of May 11, during the shift, it is undisputed that Farmer picked up off of the floor what is referred to as a "side-strip," a piece of meat trimmed from a pork belly prior to the remainder of the pork belly being sliced into bacon. Although not sliced into bacon, the side-strips trimmed from pork bellies are referred to as bacon. The length of the side-strip that Farmer picked up is disputed, ranging from a foot to 2 feet. What Farmer did with the side-strip and the identity of the employees who observed him is also disputed.

Farmer testified that he was "playing with" employee Gloria Carr by waving the side-strip at her and telling her that he was going to come over and "spank her with it." Farmer knew Carr, having attended school with her brother. He testified that the side-strip was "ruler length," about a foot, that he waved it in the air, above shoulder height, for no more than a minute, and that he then threw it back on the floor. As he was teasing Carr in this manner, Farmer testified that employee Lakenya Harris was behind him and observed what he was doing. Farmer, Carr, and Harris are all African-Americans.

Employee Carr works on the "stack pack" line, adjacent to where Farmer loaded the pressed pork bellies into the plastic cart before transporting them to the slicer. Although she did not hear Farmer say anything to her, she observed him "swinging a piece of bacon in his hand." It was "[a]bout a foot long." She did not know where he obtained it, "all I know is he came around the pole with it in his hand." Farmer was "behind the pole," no more than 15 feet away. Carr testified that Farmer was swinging the bacon at chest or shoulder height. He did this for 1 or 2 minutes. "Lakenya Harris and Tammy were also there. We were the only ones [in the immediate area]. Everybody was laughing and giggling." Carr did not see any supervisor in the area. Although some Hispanic women also work on the stack pack line, Carr did not believe that they observed Farmer because they worked "down on the other end" of the line.

Lakenya Harris also works on the stack pack line. She was working across from Carr packing bacon as it came to the employees on a conveyer belt. At the time she observed Farmer, Harris testified that there was no bacon to be packed, there was "[n]othing on the [conveyer] belt." Harris heard Farmer call to Carr. She testified that he had a piece of bacon that was about 18 inches long in his hand, and he was swinging it at chest level. He did this for about a minute. She was about 15 feet away from Farmer and laughed at him. Harris confirmed that there were no Hispanic women in the immediate area, they

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upon the 10(b) argument, and I have agreed that this allegation of conduct occurring more than 6 months prior to the filing of the charge cannot be the basis for an unfair labor practice finding. In the absence of any denial, I have credited Williams; however, since Respondent chose not to address the allegation, it was not fully litigated, and I make no unfair labor practice finding with regard to it. See *Seaward International, Inc.*, 270 NLRB 1034 (1984).

were "way at the other end of the line." According to Harris, those employees were working, not laughing at Farmer.

Quality Assurance Supervisor Curtis Davis also observed Farmer on the evening of May 11. According to Davis, he saw Farmer at the end of the pressing line, between the pressing line and slicing line, with a side-strip of bacon that was approximately 2-feet long. "He was holding it in front of his genital area, protruding outward as to simulate a sexual organ and waving it back and forth toward the [Hispanic] ladies on the line across from where he works." Davis immediately went to contact Superintendent Norman Kirkland. When they returned, Farmer had ceased engaging in the conduct that Davis had reported. Davis signed a statement giving his account of the incident. Although Davis testified that he did not recall hearing Farmer say anything, his written report refers to Farmer yelling across the room, "trying to attract the attention of the ladies in the slicing department." Counsel for the General Counsel notes the reference to the slicing department and the evidence that the women involved worked on the stack pack line. Although Davis did refer to the employees being on the slicing line, in later testimony he explained that the slicer is on the packing line. Davis testified that his involvement ended with his report to Kirkland and that he does not know if Kirkland, or anyone else, spoke with any of the witnesses.

Eufemio Gonzalez, a Hispanic employee, worked on the pressing line with Farmer. Although he did not know Farmer's name, he identified his photograph at the hearing. When shown a photograph of a different employee, he maintained his initial identification of Farmer.[4] He recalled an incident that involved Farmer that occurred on the last day he saw Farmer in the plant. According to Gonzalez, Farmer took a piece of bacon, which he estimated was 2-feet long. "put it in his genital area and moved it up and down, he did this three times." There were three Hispanic women that he believes saw this. Consistent with the written report of Davis regarding Farmer yelling something, Gonzalez testified that Farmer asked the employee named Adrieana to watch him.[5] According to Gonzalez, there were "three black men . . . that were laughing," but he did not see any black women. Gonzalez testified that a supervisor spoke to him about the incident after it occurred. He did not know the name of the supervisor but he "always had a camera and is always checking that everything is clean." Gonzalez knew Superintendent Norman Kirkland, but says Kirkland did not speak to him. Gonzalez testified that the Hispanic women were nearby when the supervisor spoke with him and that the supervisor "asked questions of the others" and "laughed when *we* explained what happened." (Emphasis added.)

Kirkland called Farmer into his office. Davis was present. Farmer testified that Kirkland already had a write-up prepared when he went into the office. Kirkland told Farmer that Davis had observed him with a piece of meat at his groin area as if it were a penis. Farmer testified that he responded that Davis' "information was not accurate because I did nothing of the sort." Farmer did not testify that he informed Kirkland that he had waved a side-strip at chest height or higher when "playing with" Carr. Kirkland informed Farmer that he was suspended and to report to Gilliard the next day.

I found Davis, Gonzalez, Carr, and Harris all to be credible and to have sought truthfully to relate what they recall observing almost 2 years earlier. In so finding, I am mindful of the discrepancies relating to the time of incident, the length of the side-strip, and the location of the witnesses in relationship to Farmer. No diagram or blueprint of the area in question was presented by any party, and the area is not now configured as it was in May 1999. The exact juxtaposition of Harris in relationship to Carr and to Farmer, who testified that Harris was behind him, is simply not clear in the record. What is clear is that there were no Hispanic employees near Harris and Carr. The Hispanic women were "way at the other end of the line." Davis and Gonzalez both testified that Farmer was observed by Hispanic women. Gonzalez recalled that three African-American men observed Farmer but did not mention any African-American women. The foregoing evidence compels me to conclude that Farmer engaged in conduct using a bacon side-strip twice, once when he was observed by Davis, Gonzalez, and the Hispanic women and once in the presence of Carr and Harris. Even if my conclusion is incorrect, it is uncontraverted that Davis reported what he observed and that Farmer, although denying to Kirkland the conduct reported by Davis, did not report waving the side-strip at Carr.

When Human Resources Manager Gilliard arrived at work on May 12, he found a written report from Kirkland in his mailbox. The report attaches a document reflecting that Farmer had been suspended after Quality Assurance Supervisor Davis had reported observing Farmer holding a 2-foot strip of bacon in "his groin area as though it was a penis." Kirkland's report notes that the conduct reported by Davis was confirmed by employees Adriana Rodriguez, Laura Reges, and Eufemio Gonzales, and that he did not "talk to any more people after those 3." Although there is no evidence of inadequate job performance or any prior disciplinary matter relating to Farmer, Kirkland's report notes that "Andre [Farmer] is a problem person."

When Kirkland reported to work on the afternoon of May 12, Gilliard spoke with him. Kirkland confirmed the information contained in his report, noting that he had validated the report of Davis with Rodriguez, Reges, and Gonzales. Kirkland informed Gilliard that he had directed Farmer to report to human resources that afternoon. When Farmer reported, Gilliard testi-

[4] Consistent with my notes and the request of the Respondent, Gonzalez's first name is corrected to Eufemio rather than Enfemio as it appears in the record. Contrary to the statement in the brief of the General Counsel, Gonzalez never referred to Farmer as "Kenneth A. Soperson." The foregoing misstatement in the transcript occurs at a point when Gonzalez made reference to an "unknown person," a black man whose name he did not recall.

[5] The testimony that Gonzalez heard Farmer ask Rodriguez to watch confirms that he does understand some English. Employee Nicole Baines testified that she knows Gonzalez and that he spoke to her in English as he was leaving the hearing. She testified that he understands English if "you say it slow to him." The General Counsel argues that the appearance of Gonzalez with an interpreter reflects upon his credibility. I do not agree. The fact that Gonzalez may have some facility in English when spoken to slowly does not in any way obviate his need for an interpreter in a formal legal proceeding. There is no evidence contradicting the testimony of Gonzalez that he is functionally illiterate in his own native language, Spanish.

fied that he had not conducted his investigation or made any decision and so he sent Farmer back home, telling him that he would get back in touch with him. "We didn't talk about . . . his behavior at that time."

Farmer testified that on May 12, when he reported to Gilliard, Kirkland was present in the office. Gilliard "asked me if I did it, and I told him no, that it was not true." Farmer states that Gilliard told him that, if he would admit the conduct, he would have Kirkland suspend him for a few days, and "I could then come back to work." Farmer told Gilliard that he was not admitting to something that he did not do." Gilliard said he would check into it, for Farmer to call back the next day. Farmer later testified that, at the foregoing meeting with Gilliard and Kirkland, Gilliard stated that Davis had said that he had not observed Farmer but "an employee told him they saw me." I do not credit this testimony. Gilliard had not spoken with Davis, Davis credibly testified to what he saw, and Farmer did not include this purported statement by Gilliard in his initial testimony regarding this meeting.

Gilliard testified that he spoke with Davis on the evening of May 12, "it was extremely late," and that Davis confirmed the report that he had made to Kirkland. Although Davis recalls confirming his report of the incident with Gilliard, he could not recall when he did so. He specifically testified that his involvement with the incident ended when he reported the conduct he observed to Kirkland and then signed his report of the incident. Gilliard testified that he also spoke with one of the employees that Kirkland had identified as a witness. He believed it was Rodriguez, "because she is the one that speaks English." He testified that she verified that Farmer was waving the meat between his legs or at groin level as if it was a penis. Rodriguez is no longer employed and did not testify.

Gilliard testified that he and Farmer met in his office on May 13, and that Farmer's immediate supervisor, James Brown, who had not observed the incident, was also present. Gilliard questioned Farmer about what had taken place on the night of the 11th. Farmer said nothing had taken place. Gilliard stated to Farmer that he had four witnesses that had stated that Farmer had this piece of meat, waving it between his legs as if it was a penis. Farmer denied the conduct. Gilliard requested that Farmer leave the room and he and Brown spoke about how to proceed. They then called Farmer back into the room. Gilliard again informed Farmer that he had four people that said what he did. He asked Farmer to confess, noting that if he did so he would not be terminated. Farmer still refused to admit the conduct. Gilliard terminated him.

Farmer denies the meeting on May 13. He testified that, following the meeting on May 12 at which he recalled Kirkland being present, he called Gilliard who told him that "he checked into it and that he checked with some of the people upstairs and that I was terminated. He said he had checked into it and that they said that I did what he accused me of. . . ."

In assessing the foregoing testimony, I attribute no significance to the differing versions of the contact between Gilliard and Farmer. Although I am inclined to believe that the termination took place in person rather than over the telephone, Farmer and Gilliard agree that, at some point, Gilliard stated that Farmer would not be terminated if he confessed. I have no doubt that Gilliard referred to having "checked with some of the people upstairs." Gilliard did not deny this comment.

I have some doubt as to whether Gilliard did, in fact, interview anyone other than Kirkland. Davis testified that his involvement in the matter ended when he made his report to Kirkland on the evening of May 11. When questioned regarding his efforts to conduct an investigation, Gilliard testified that "Kirkland had done the investigation, he was the superintendent of second shift operations, someone that was thoroughly familiar with doing investigations. And I wasn't going to be redundant and attempt to talk to everybody that he had talked with . . . ."

Regardless of whether Gilliard did independently verify Kirkland's report, it is undisputed that, at the time the Company was determining what action to take regarding Farmer, the facts in its possession were the report of a supervisor that had been corroborated by employees and a denial, but no further comment, by Farmer. Quality Assurance Supervisor Davis had reported what he observed. He confirmed that observation in testimony at this hearing, and I have credited his testimony. Gonzalez denied that he spoke to Kirkland. Whether Kirkland falsely reported that he, rather than another supervisor, had spoken with the employees or whether Gonzalez was mistaken regarding with whom he spoke, the testimony of Gonzalez establishes that a supervisor did speak with him, that the supervisor "asked questions of the others," and "laughed when we explained what happened." I have also credited Carr and Harris and, in so doing, have concluded that Farmer engaged in conduct using a side-strip twice. Even if my conclusion that Farmer engaged in conduct with the side-strip twice is incorrect, there is no probative evidence that Farmer ever informed any management official that he had waved the side-strip at chest height or higher at Carr. Thus, the only version of the incident that had been reported and that was under review was the version contained in Kirkland's report.

Gilliard testified that it had not been his objective to terminate Farmer. Although Farmer's conduct was inappropriate, it was not "inappropriate enough to resort to termination." Notwithstanding his admission that this one time incident was not a dischargeable offense, Gilliard explained his action stating, "It is kind of hard to give a level of discipline to someone who doesn't even admit to the violation. It puts us as a Company in quite a bit of risk." Gilliard did not explain the nature of risk to which he referred. Gilliard later testified that Farmer was terminated because he did not admit the misconduct in which he was alleged to have engaged, that it "was difficult to discipline Mr. Farmer and correct that behavior if he was not willing to admit [it] . . . ."

All parties introduced evidence relating to the Company's tolerance or intolerance of sexual harassment. Employee Nicole Baines, called by the Charging Party, related repeated incidents of sexual harassment by Supervisor James Brown who she alleged touched her improperly. She states she reported this to Kirkland on as many as six occasions including one meeting in his office at which Kirkland directed Brown to cease the conduct. Baines also testified to a meeting with Plant Manager Price, Gilliard, and either Kirkland or Superintendent Marvin Peterson who replaced Kirkland. Price recalled no such

meeting. He did recall receiving a complaint about Brown from Baines and that he referred the matter to Gilliard and Peterson. His testimony is undenied that, thereafter, he asked Baines if everything had been taken care of to her satisfaction and she replied that it had. Price testified that it was shortly after this that Brown resigned. Brown resigned on August 19. He was replaced by Supervisor Cecil Jones who, according to Baines, she also reported for improperly touching her. She testified that, following her report, she met with Price, Peterson, and Gilliard. All three denied any such meeting. There is no documentary evidence of Baines' complaints.

Employee Craig Best was counseled but not terminated in July 1998. A female employee alleged that, when she rejected his advances, Best began spreading false rumors about her to her coworkers on the second shift. The Company's investigation revealed that, on Tuesday night, July 14, 1998, on second shift, Best "started telling other people that she [the female employee] was easy, and other 'bad things.'" The Company's investigative memorandum states, "This is when she told her supervisor Dallas she was going to quit." The female employee requested that Best not be terminated because she "would be afraid" if he was terminated. A memorandum of the counseling meeting with Best reports that, when confronted with the allegations, Best denied that the conduct occurred in the workplace. His written comment reflects that he denied the conduct altogether, stating that he "disagree[s] with the allegations."

Supervisor Mel Parker was counseled on November 10, 1998, after he allegedly called a female employee a "bitch." Parker did not admit the conduct but, in a manner not specified in the memorandum regarding the incident, "indicated" that he "may have said it."

Employee Kenny Wilkes sought to have a female employee to go out with him. She refused, and he persisted. She reported his continued unwanted attention. The record does not reflect the specifics; however, on November 25, 1998, Wilkes was warned, but not terminated, for "assaulting 'verbally' a fellow employee in a degrading manner." On the back of the warning notice issued to Wilkes, he wrote: "[A]llegations made are not true. I Kenny Wilkes have never made any such statements."

Employee Derick Dales was advised, in December 1998, that any further action of harassment would result in disciplinary action, including discharge. The record does not reflect the specific action in which Dales engaged.

After Farmer was terminated, employee Jose Rivera was only counseled after it was reported that, in August 1999, he directed sexually explicit language to a female employee.

The Company placed in evidence documents reflecting that employee Greg Williams was terminated in December 1999, and that employee Chris Willoughby was terminated in May 2000, both for directing sexually explicit language to a female employee.

Supervisor Greg Bridges was terminated in February 1999, for violation of the Company nonfraternization policy resulting in favoritism being shown to a subordinate. Bridges had previously been accused of sexual harassment. An investigation of that complaint in November 1998 had cleared Bridges of the harassment charge but resulted in his being cautioned regarding the Company's nonfraternization policy. Superintendent Dwight Weaver was disciplined for violation of the Company's nonfraternization policy in August 2000.

2. Analysis and concluding findings

The complaint alleges that the Respondent, on May 13, discharged Farmer because of his union activity. In assessing the evidence under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), I find that Farmer did engage in union activity, that the Respondent was aware of his sentiments, and that the Respondent bore animus towards employees who engaged in union activity. The action taken against Farmer, discharge, was clearly an adverse action that affected his terms and conditions of employment. Farmer did not commit a dischargeable offense. Gilliard testified that the conduct in which Farmer engaged was inappropriate, but it was not "inappropriate enough to resort to termination." The General Counsel has established that Farmer's union activity was a substantial and motivating factor in the Respondent's action. *Manno Electric*, 321 NLRB 278, 281 (1996).

The Respondent has not established that it would have taken the same action against Farmer in the absence of his union activity. Documentary evidence establishes that no employee had, prior to May 1999, been terminated for a first offense of sexual harassment.

The Respondent argues that, in the absence of an admission by Farmer, the Respondent could not counsel him appropriately, "take appropriate and legally required remedial action," or "risk Mr. Farmer continuing to work in the plant when he would not cooperate in the Respondent's effort to rehabilitate him." The foregoing argument might have some merit if the record established that the presence or absence of an admission determined whether an employee was retained or terminated. It does not. Gilliard testified that Farmer was terminated because "[i]t is kind of hard to give a level of discipline to someone who doesn't even admit to the violation. It puts us as a Company in quite a bit of risk." Gilliard did not specify the nature of the risk or how the risk of retaining Farmer, a union adherent, placed the Respondent in any different position than retaining Best, who had denied engaging in the conduct of which he was accused and from whom the complaining female feared retaliation, or Wilkes, who also denied the conduct of which he was accused.

There is no evidence that the Respondent's position of terminating employees who did not admit the conduct of which they were accused was operative prior to the Union instituting its organizational campaign. Documentary evidence reveals that no employee had, prior to May 1999, been terminated for a first offense of sexual harassment whether the employee admitted or denied the conduct. The Respondent argues that Best's situation differs from Farmer's since Best only denied engaging in the alleged conduct in the workplace. This argument ignores his written comment on the memorandum of his counseling in which Best states that he "disagree[s] with the allegations." It also ignores the Respondent's investigation which reflects that the conduct did occur in the workplace, that on a Tuesday, July 14, 1998, Best started telling coworkers on the second shift that the complaining female employee was "easy" and "other 'bad

things,'" and that "[t]his is when she told her supervisor . . . that she was going to quit." Contrary to the Respondent's contention that Wilkes did not deny the conduct of which he was accused, the back of his warning contains his statement denying the allegations. Even after Farmer was terminated, employee Jose Rivera was only counseled after it was reported, in August 1999, that he had directed sexually explicit language to a female employee.

The terminations of employee Greg Williams in December 1999, and of Chris Willoughby in May 2000, occurred more than 6 months after the Farmer termination and after the charge regarding it had been filed. I place no weight upon this evidence.

I also place no weight upon evidence relating to violation of the Respondent's nonfraternization policy. In *Carpenter v. Federal National Mortgage Assn.*, 165 F.3d 69 (D.C. Cir. 1999), a case relating to alleged discrimination against an employee who had advocated a nonfraternization policy, the Court of Appeals distinguished fraternization from harassment quoting Gloria Steinem with regard to fraternization policies: "[W]elcome sexual behavior is about as relevant to sexual harassment as borrowing a car is to stealing one." Id at 73. I agree.

Farmer was an ardent supporter of the Union whose enthusiasm had resulted in his not being invited to the Respondent's antiunion meetings after he had asked questions at the two meetings in which he had been included. Despite the absence of any evidence that his job performance was deficient or that he had been disciplined, Kirkland referred to him as "a problem person" in the report he made following the incident of May 11. Insofar as there is no objective evidence establishing any work related basis for that reference, I can come to no conclusion other than that Kirkland's reference was a euphemism for Farmer's union activity. No employee had been terminated for engaging in sexual harassment prior to May 1999. Indeed, other than Farmer, the Respondent is not shown to have even contemplated discharge for such conduct until August 1999 when Supervisor Brown, who had been accused of improperly touching employees, resigned. Gilliard admitted that the conduct in which Farmer engaged was not "inappropriate enough to resort to termination." Farmer denied the conduct of which he was accused just as employees Best and Wilkes denied the conduct of which they were accused. Neither Best nor Wilkes was terminated. The General Counsel has established that Farmer's union activity was a substantial and motivating factor in the Respondent's action, and the Respondent has not established that Farmer would have been terminated in the absence of his union activity. I find that the Respondent, by discharging Andre Farmer, violated Section 8(a)(3) of the Act.

D. Case 11–CA–18606, The Constructive Discharge of Clairenette Williams

1. Facts

Williams was a known supporter of the Union. She solicited authorization cards from her fellow employees, distributed handbills, and served as a union observer at the representation election held on July 8. Williams began working at Smithfield on February 4, 1998, and when employed there she held various jobs including the positions of clerk in the bacon department, clerk in payroll, and clerk in human resources. On April 19, she became the crew leader on second shift in the shipping department. In that position she unloaded trucks, loaded trucks, prepared invoices for the trucks, moved product that was to be shipped from the second floor of the plant to the first floor shipping area, and performed inventory and scanning. When performing scanning she sometimes had to lift boxes of bacon that weighed from 20 to 35 pounds in order to locate the label that needed to be scanned.

On August 16, Williams was injured on the job. She fell down a section of stairs as she was returning to the first floor after having loaded the freight elevator with product that was to be shipped. Her injury was reported. She drove herself to the emergency room where she was treated and released. She was examined by a Company physician on August 17 and 19. The physician's report of August 19 notes that Williams had worked after her injury. He restricted her to light duty, prohibiting prolonged walking or standing, climbing ladders or stairs, lifting greater than 10 to 15 pounds, repetitive bending or prolonged stooping, pushing or pulling greater than 15 to 20 pounds, and working above shoulder height or overhead. His report of August 19 notes that she could do sedentary work. Williams was again examined on August 23 and August 26. She continued to be restricted to light duty, but as of August 23, was permitted to climb stairs. Following an examination on September 7, Williams was released for work without restriction. She was never again restricted as a result of the injury of August 16.

Williams recalls that she advised management of her restrictions a "couple of days after the accident," presumably after her second examination on August 19. Williams recalled telling Shipping Department Manager Phil Lytle that she was "supposed to have light duty." Lytle directed Williams to see Human Resources Director Gilliard. Williams went to Gilliard's office "a couple of times," but he was not there and she never talked to him. She had no further conversation with Lytle. Although testifying that she was never placed on light duty, Superintendent Marvin Peterson recalls that Williams informed him of her restrictions and questioned whether she could do her job, specifically noting that she could not operate a pallet jack. Peterson states that he informed her that he agreed that she could not operate the pallet jack and that she "needed to work within her restrictions." A Company listing reflects that employee "C. Williams" was on light duty from August 19 until September 3.[6] After September 7, Williams was again examined on September 29 and October 11 and was, as she had been on September 7, returned to work without restriction. None of the medical reports reflect a complaint by Williams that she had been required to work outside of her restrictions.

Williams testified that the workload in the shipping department on second shift increased in the summer of 1999. There is

[6] This document, Charging Party's Exhibit 11 (CP Exh 11), was admitted into evidence at the hearing. Copies of this document are now in the possession of all parties and, pursuant to the posthearing agreement of all parties, it has been placed in the official exhibit file.

conflicting testimony regarding the impact of the Company's production of hot dogs from June 21 until August 20, but Williams was not injured until August 16. It is undisputed that employee DeGregory Jefferson began working in shipping on July 1, employee Travis Taylor worked in shipping for a couple of weeks in July, and Byron Jenkins began working in shipping on November 1. On November 1, Rick Griffin was appointed as supervisor of the second shift in the shipping department.

Williams testified that, after her injury, she continued to perform her job but, "I was feeling worse and worse by the day." She acknowledged that she made no complaint to any member of management that pain resulting from her injury was bothering her from September 7 until December 6. There is no evidence of any such complaint or that the pain that she testified she experienced affected her job performance. The brief of the Charging Party asserts that Harvester Best, the crew leader on second shift in the palletizing department, from which the shipping department obtained the product that was to be shipped, was "aware of Williams' medical problems." Best testified that employees in the shipping department informed him that Williams had told them that her physician had stated, at some point, that she had "some kind of back problem and some kind of problem with her head." The foregoing hearsay report does not mention pain, only a medical diagnosis. None of Williams' coworkers testified. Best specifically testified that Williams made no complaint of pain after she returned to work following her fall on August 16. In mid-November, Williams had oral surgery. On November 24, the Wednesday before Thanksgiving, she complained of back pain to her personal physician, who examined her and signed a slip returning her to work on November 30 with no restrictions noted. Williams returned to work on December 1.

Williams' attendance calendar reflects several absences during September, October, and November that state that she called in "sick." Her attendance calendar reflects that, on November 30, Williams "did not return as scheduled." Although Williams' attendance, as reflected on the calendar, shows that she had accumulated more than 6 points and was, therefore, subject to being discharged under the Company's attendance policy, she had received no discipline. Department Manager Lytle brought Williams' attendance calendar to Gilliard at some point after she failed to report on November 30. Gilliard did not recall when he received it, but it was in his possession on December 6.

On December 6, after reporting to work, Williams spoke with Gilliard. She met with him about 4:30 or 5 p.m. Williams testified that she was referred to Gilliard after requesting a medical leave of absence from Supervisor Rick Griffin. Williams acknowledged that, prior to this, she had never made any complaint of pain to Griffin.

According to Williams, she asked Gilliard if she could have a medical leave of absence and he replied, "No," stating that she had "too many points," referring to her attendance calendar that was on his desk. In a deposition given by Williams on September 19, 2000, she did not state that Gilliard said, "No." The deposition reflects that Williams testified that, when she asked for a medical leave of absence, Gilliard replied, "I could fire you right now for attendance." Williams contends that she informed Gilliard that she was hurting, she was sick, and she could not do the job, but that he ignored her complaints and changed the subject, referring to her attitude and an unemployment hearing involving employee Shaniqua Moore at which Williams had appeared. She testified that Gilliard asked why she had gone to the unemployment hearing to talk against the Company and that she responded that she was on her own time and answered only the questions that she was asked. In the course of their conversation, the supervisory position to which Griffin had been appointed was mentioned. It appears that Williams had wanted to be considered for that supervisory position. She testified that Gilliard said her name had come up, but he disapproved it, because of her attitude. At some point, Williams recalled that Gilliard said that she had too many attendance points and that he could fire her and get away with it. Williams replied that she "got hurt on his job" and had a doctor's note for the days she was out. Gilliard responded that he didn't need a reason to fire her. Williams again asked for a medical leave of absence. She testified that Gilliard "didn't give me an answer one way or the other," and so she "just walked out of his office."

Gilliard recalls that Griffin called him and advised that Williams wanted to speak with him. No reason was given. Williams came to his office where she informed Gilliard that she was experiencing several personal problems, including dealing with her friend Shaniqua Moore and with her son. She noted that she had these emotional issues and "needed some time away to get herself together." She asked for a "personal leave of absence." Gilliard denied that Williams made any reference to her physical problems or that she requested a medical leave of absence. He acknowledged that the supervisory position to which Griffin had been appointed was mentioned, that Williams stated that she should have been considered for the supervisory job. He responded that it was hard for her to have been considered since "her attendance record doesn't set the tone or expectation of what we expect out of our members of management." Regarding the request for a personal leave of absence, Gilliard testified that he informed her he "would get back with her" because the Department Manager Phil Lytle "needed to be involved."

Neither Williams nor Gilliard was a particularly impressive witness. The bias of both was apparent, and both were defensive. On balance, from demeanor and inconsistencies in the testimony of Williams, I find that Gilliard was more credible. If, as Williams testified, her pain was so great that she could not perform her job, her incapacity would certainly have been observed by her supervisors, coworkers, and physicians, none of whom restricted her after September 7. There is no evidence of any deficiency in her job performance. Williams testified that she told Lytle that she was hurting "right after the injury" when she asked about light duty and was referred to Gilliard who she never saw. Thereafter, she never complained of pain to any supervisor, including Griffin. "I never talked to Rick [Griffin] about it [pain]," except on December 6 when she said she requested medical leave and he referred her to Gilliard. Williams had once worked as a clerk in human resources, and she knew that she needed to have an excuse from a physician in order not to be assessed points for an absence of even 1 day.

She had been examined by her own physician on November 24 and returned to work with no restrictions on November 30. Although testifying that she asked for a medical leave immediately upon entering Gilliard's office and that he said, "No," she did not make this statement in her deposition. I find it impossible to believe that she would request a medical leave of absence without first obtaining some document from a physician to present in support of her request.

Gilliard denied that Williams informed him that "she was hurting, she was sick, and she could not do the job," and I credit his denial. Contrary to the Charging Party's argument, there is no basis for inferring that Gilliard was aware of "continuing medical problems" as a result of Williams' injury in August. Williams' attendance calendar notes, on the days that she missed from September through November 24, that she was "sick." She missed only 1 day of work in October. Her absences in mid-November were related to oral surgery. The return to work slip stating that she was under her physician's care from November 24 until November 30 does not state a reason for the medical treatment she had received. There is no evidence of any deficiency in Williams' job performance. The evidence establishes that Williams worked through whatever pain she experienced. No physician restricted her after September 7 or prescribed a medical leave of absence for her. Upon the conclusion of her meeting with Gilliard, Williams returned to work. Gilliard testified that if Williams had requested medical leave he would have referred her to the plant nurse.

Williams and Gilliard agree that, in their conversation, the appointment of Griffin was mentioned. Gilliard recalled that it was at this point that he mentioned Williams' attendance problems. Williams recalled that Gilliard referred to her attitude. There is no complaint allegation relating to the selection of Griffin instead of Williams as supervisor of the shipping department on second shift. The comments Williams attributed to Gilliard, that she "had too many points and that he could fire [her] and get away with it," and that he "didn't need a reason to fire her," are not alleged as threats of discharge.[7]

Although Gilliard testified that Williams requested a "personal leave of absence," I find that this was his characterization of her request. I find that Williams, on December 6, did not specify the type of leave of absence she was seeking. She simply requested a leave of absence and cited personal reasons. Gilliard informed her that he would get back with her because Department Manager Phil Lytle "needed to be involved."

On December 7, although calling in and reporting that she would be late, Williams did not report. On December 8, Gilliard wrote a memorandum to Lytle noting that Williams had excessive attendance points and that he needed to talk to her. On December 8, Lytle prepared a warning to Williams for her failure to report on December 7. The warning states that further violations would result in termination. Williams did not report on December 8 or 9, thus she never received the warning. Williams' absences of December 8 and 9 are also recorded on the warning prepared on December 8 regarding her absence on December 7.

Both counsel for the General Counsel and counsel for the Charging Party argue that the foregoing reflects an intention by the Respondent to terminate Williams for attendance violations. I do not agree. Lytle had brought Williams' attendance problem to Gilliard's attention when she failed to report to work on November 30. They neither prepared nor issued any discipline to Williams for her attendance infractions prior to December 6. The warning prepared on December 8 regarding her failure to report on December 7 is not a termination. It reflects that she would be terminated for future violations. Williams never received this document since she never appeared for work after December 6.

Counsel for the General Counsel, apparently accepting for the sake of argument the testimony of Gilliard that he "would get back with" Williams, argues that there is no evidence that he spoke with Lytle and that he did not get back with Williams. The foregoing argument fails to cite the further testimony of Gilliard that he never made a decision regarding Williams' request for a personal leave of absence because she never returned to work. Simply put, he never made a decision because he did not have to.

The Respondent's employee handbook provides that an employee must present appropriate medical certification when leave is requested because of the employee's medical condition. A personal leave of absence is to be requested in writing from the employee's supervisor and human resources. Counsel for the Charging Party introduced documents reflecting both medical and personal leaves of absence for various employees. The medical leaves of absence refer to requests from physicians or events such as automobile accidents and pregnancy. There is no instance in which medical leave was granted without medical documentation on the basis of an employee's complaints of pain. Counsel notes that employee Magazine was granted personal leave to be with her daughter in an emergency situation on November 30, 2000, without the supervisor's approval. The document, although not containing the supervisor's approval, was approved by the plant superintendent.

Counsel for the General Counsel introduced a neurological consultation dated February 21, 2000, that reflects it was performed in connection with a workman's compensation claim. The document states that Williams complained that she continued to experience headaches and back pain.

2. Analysis and concluding findings

The complaint alleges that the Respondent discharged Williams on December 8. The General Counsel and the Charging Party argue that Williams was constructively discharged by the failure of the Respondent to accommodate Williams by granting her request for a medical leave of absence thereby causing her to quit. The record establishes Williams' union activity, the Respondent's knowledge of that activity, and its animus towards such activity. The record does not establish an adverse action by the Respondent with regard to Williams' employment. The probative evidence establishes that Williams requested a leave of absence citing personal reasons, that the

[7] The initial charge in Case 11–CA–18606 alleges a comment regarding Williams' failure to be appointed to the supervisory position held by Griffin as an unfair labor practice, but no such allegation is in the complaint.

Respondent did not immediately grant that request, and that Williams quit.

In the course of the hearing, counsel for the General Counsel elicited testimony regarding the job duties performed by Williams, the purported failure of the Company to assign Williams to light duty following her injury, and a purported increase in her workload. Relative to workload, the record does establish that work in the shipping department on second shift increased in the summer of 1999, but it also establishes that additional employees were assigned to the second shift to assist in performing that work. There is no allegation that the Respondent manipulated the amount of work in the shipping department in an effort to make Williams' job more difficult following her injury. The Section 10(b) date with regard to the charge is August 28. Although Williams was restricted to light duty until September 7, but purportedly not assigned such duty, there is no probative evidence that she was required to work outside of her restrictions and there is no charge or complaint allegation alleging a failure to assign light duty to Williams between August 28 and September 7. Neither the brief filed by the General Counsel nor the brief filed the by Charging Party acknowledges or discusses the undisputed evidence that Williams was not restricted in any manner by any physician, including her own physician, as a result of her August 16 injury at any time after September 7.

The test for determining whether an employee has been constructively discharged is set out in *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1969):

> First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

In *Davis Electric Wallingford Corp.*, 318 NLRB 375, 376 (1995), the Board noted that a *Wright Line* analysis is applicable only to the second prong of the test enunciated in *Crystal Princeton*. In *American Licorice Co.*, 299 NLRB 145, 148 (1990), the Board stated that the *Crystal Princeton* test should not "be read so narrowly as to apply only when an employer has changed an employee's working conditions," and cited *St. Joseph's Hospital*, 247 NLRB 869, 873, 880 (1980), in which the employer could have accommodated an employee's request for a change in hours but refused to do so. In *American Licorice*, the Board reached a similar conclusion, finding that the employer could have accommodated the employee "but refused to do so for unlawful reasons, even though it reasonably should have foreseen that its decision would force her to quit." Id. at 148. The Board noted that, in determining whether an employer has constructively discharged an employee, the issue is not "whether the employer specifically intended to cause the employee to quit, but includes whether, under the circumstances, the employer reasonably should have foreseen that its action would have that result." Ibid. Notwithstanding this principle, if it cannot reasonably be found that a respondent's action would cause an employee to quit, the employee may not elevate a respondent's action into an unlawful constructive discharge by quitting. *Aero Industries*, 314 NLRB 741, 742 (1994). The foregoing is true even if the employee has a reasonable fear of future discharge. Ibid.

The principles enunciated above are applicable in the instant case. Williams' decision to quit after the Respondent failed immediately to grant her verbal request for a leave of absence for personal reasons was not foreseeable. Although Williams testified that she requested a medical leave of absence and complained of pain, I have not credited that testimony. Even if I had found that Williams requested a medical leave of absence, the record establishes that such leaves require medical certification and Williams had none. Pursuant to the Respondent's policy, Williams' should have submitted her request for a leave of absence for personal reasons in writing through her supervisor and human resources, but she did not do so. The Respondent never refused to accommodate her verbal request for a leave of absence. The credited evidence establishes that, after Williams requested a leave of absence citing personal reasons, Gilliard informed her that he "would get back with her" because Department Manager Lytle "needed to be involved." Williams was crew leader on the second shift in the shipping department. There is no evidence disputing Gilliard's testimony that he needed to contact Department Manager Lytle before approving a leave of absence for personal reasons for this key employee. There is no evidence whatsoever that the Respondent could have reasonably foreseen that its failure immediately to grant Williams request for leave to deal with some personal problems would cause her to quit. *American Licorice Co.*, supra at 148; *Aero Industries*, supra at 742. The absence of foreseeability is confirmed by the evidence that Williams returned to work and completed her shift on December 6 and that, on December 7, she called stating that she would be late but thereafter did not report to work. I shall recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

By discharging an employee because of his union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Andre Farmer on May 13, 1999, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent will also be ordered to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Smithfield Packing Company, Incorporated, Wilson, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting United Food and Commercial Workers, Local 204, and United Food & Commercial Workers International Union, AFL–CIO, CLC, or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Andre Farmer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Andre Farmer whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify Andre Farmer in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Wilson, North Carolina, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 13, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 22, 2001

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against you for supporting the United Food and Commercial Workers, Local 204, and United Food & Commercial Workers International Union, AFL–CIO, CLC, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer Andre Farmer immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Andre Farmer whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the discharge of Andre Farmer and, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

SMITHFIELD FOODS, INC. AND SMITHFIELD PACKING COMPANY, INCORPORATED

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."